STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 15, 2007
v	No. 266369 Kent Circuit Court
MICHAEL JAY JACKSON, Defendant-Appellant.	LC No. 05-001001-FH

Before: Fort Hood, P.J., and White and Borrello, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of assault with a dangerous weapon (felonious assault), MCL 750.82. He was sentenced as an habitual offender, fourth offense, MCL 769.12, to four to fifteen years' imprisonment. Defendant appeals as of right, and we affirm.

On November 28, 2004, Jose Barrera was walking when a car stopped along side him, and defendant and two other men got out of the car. Defendant approached Barrera with an open knife in his hand. The other two men attempted to surround Barrera, with one proceeding behind him and the second man off to his side. Defendant faced Barrera on the sidewalk from approximately five feet away, and stated: "You snitchin." Instead of waiting for defendant to reach him or the two men to grab him and hold him, Barrera "went for" defendant and the knife. The two struggled, and both fell to the ground. While they wrestled on the ground, the other two men punched and kicked Barrera, and eventually pulled Barrera off defendant. Defendant and his two accomplices then jumped back into the car and it took off. Defendant was charged with the assault.

Defendant argues that there was insufficient evidence to support his conviction for felonious assault. We disagree. We review a challenge to the sufficiency of the evidence reviewed de novo. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). We determine, viewing the evidence in the light most favorable to the prosecution, whether a rational jury could find "that the essential elements of the crime were proven beyond a reasonable doubt." *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002). However, we do not determine what testimony to believe; rather, we resolve any conflicts in the evidence in the prosecution's favor, *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997), and, in matters of the credibility of conflicting testimony, we give the jury's verdict great deference, *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

The elements of felonious assault are (1) the defendant committed an assault; (2) with a gun, knife, or other dangerous weapon; (3) with the intent to injure or to place a victim within reasonable fear or apprehension of an immediate battery. MCL 750.82; *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999); *People v Lawton*, 196 Mich App 341, 349; 492 NW2d 810 (1992). Either of the two types of assault under Michigan law may fulfill the assault element: an attempted-battery assault, or an apprehension-type assault that arises when a defendant performs an unlawful act that places another in reasonable apprehension of receiving an immediate battery. *People v Starks*, 473 Mich 227, 234; 701 NW2d 136 (2005). A battery is "'an intentional, unconsented, and harmful or offensive touching of another or of something closely connected with the person.'" *Id*., quoting *People v Reeves*, 458 Mich 236, 240 n 4; 580 NW2d 433 (1998). The jury may infer the requisite intent from the conduct of the accused and all of the surrounding circumstances. *Lawton, supra* at 349.

Defendant argues that felonious assault is a specific intent crime, and the prosecution did not prove beyond a reasonable doubt that he intended to injure Barrera or to place him in reasonable apprehension of receiving an imminent battery. He seemingly argues that because he was prevented from physically touching Barrera by Barrera's grabbing the knife, he did not "assault" Barrera. However, the actual infliction of harm, or even the actual ability to inflict threatened harm, is largely irrelevant, as long as the victim reasonably apprehends an imminent battery. *Reeves, supra* at 244. Here, defendant approached to within five feet of Barrera with a knife in his hand and threatened him with his statement "You snitchin." Barrera stopped defendant from completing a battery. Nevertheless, that does not mean that Barrera did not have a reasonable apprehension of an imminent battery.

A "fleeting" aim of the gun at a victim is enough to cause a reasonable apprehension of an imminent battery. *People v McConnell*, 124 Mich App 672, 678-679; 335 NW2d 226 (1982). Furthermore, merely displaying a weapon implies a threat of violence and causes reasonable apprehension of an imminent battery. *People v Pace*, 102 Mich App 522, 534; 302 NW2d 216 (1980). We held in *Pace* that the fact that the defendant did not lunge at the victim or wield the knife was irrelevant, because the mere display of a weapon without pointing it at the victim was sufficient evidence to prove felonious assault. *Id.* at 533-534.

Here, Barrera testified that defendant had the knife in his hand, placed down at his side, but slightly in front of his body. That mere display implies a threat of violence. In addition, Barrera testified that when defendant said "You snitchin," he knew immediately defendant was referring to Barrera's assistance to police, and that defendant meant to hurt him. This statement and the presence of the other men behind him caused him to reach for the knife. Clearly, defendant intended to intimidate Barrera. The fact that the two men attempted to surround Barrera, so that he believed they were going to grab him and hold him, provides additional evidence to support that Barrera reasonably feared an imminent battery, and that defendant intended that he do so. Moreover, a witness to the assault testified that it appeared defendant and the other two men were attacking Barrera; he did not see Barrera swing first. Viewed in the light most favorable to the prosecution, we conclude that a reasonable jury could find, beyond a reasonable doubt, that defendant intended to cause an apprehension of an imminent battery.

Defendant next argues that his right to a fair trial was violated by the ineffective assistance of his trial counsel. According to defendant, his counsel performed below the standard for effective assistance because she was mistaken about the number of peremptory

challenges available to defendant, and used only two of the five allowed. We conclude that although counsel's performance was deficient, defendant's right to effective assistance of counsel was not violated because defendant has failed to show he was prejudiced.

The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. We review the trial court's factual findings for clear error, and its constitutional determinations de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In *People v Pickens*, 446 Mich 298, 326-327; 521 NW2d 797 (1994), our Supreme Court adopted the federal standard for ineffective assistance of counsel established in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To establish a claim of ineffective assistance of counsel, defendant must show that his counsel's performance was deficient under an objective standard of reasonableness and that but for counsel's error the result of the proceeding would have been different; therefore, he was denied a fair trial. *People v Grant*, 470 Mich 477, 485-486; 684 NW2d 686 (2004). Defendant bears a "heavy burden" to overcome the presumption that counsel was effective. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

Generally, counsel's failure to challenge a juror is not a basis to claim ineffective assistance of counsel. *People v Robinson*, 154 Mich App 92, 95; 397 NW2d 229 (1986). That decision is a matter of trial strategy, and we will not evaluate the decision in hindsight. *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001). However, in this case, counsel admitted there was no trial strategy involved in the decision not to excuse the two jurors whom defendant asserts should have been removed by peremptory challenge. The trial court also found, on the record, that counsel's performance was deficient because, "[t]hat he had five [challenges] was readily knowable to anybody who looks at the rules governing proceedings in this Court." The belief that defendant had only three peremptory challenges was clearly erroneous. "Defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law" or it may be ineffective assistance of counsel. *People v Jenkins*, 99 Mich App 518, 519; 297 NW2d 706 (1980), quoting *Beasley v United States*, 491 F2d 687, 696 (CA 6, 1974). Defendant's counsel did not do so. Counsel may have had a legitimate strategy to save one peremptory challenge, as defendant argues and the trial court stated was common practice, but there could be no legitimate strategy to not know the number of peremptory challenges available. See, e.g., *People v Carrick*, 220 Mich App 17, 22; 558 NW2d 242 (1996). Thus, as the trial court found below, we hold counsel's performance was deficient and the first prong of *Strickland* is met.

Defendant bears the burden to prove that, but for the error, there is a reasonable probability the outcome would be different, not that the error had "some conceivable effect on the outcome" of the trial. *Strickland*, *supra* at 693-694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome of the trial." *Id.* We conclude that defendant has not met that burden. He argues only that if he had used all of the challenges available, the composition of the jury would have been different, and because the evidence against defendant was so weak, "it is entirely possible that a different jury may have harbored a reasonable doubt regarding Mr. Jackson's guilt" or "could quite possibly have made a different assessment of the strength of the evidence." Defendant offers only speculation that the outcome would have been different—could quite possibly is not reasonable probability.

Moreover, the underlying purpose of peremptory challenges is to protect the defendant's constitutional right to a fair and an impartial jury. *Georgia v McCollum*, 505 US 42, 57; 112 S Ct 2348; 120 L Ed 2d 33 (1992); *People v Schmitz*, 231 Mich App 521, 528; 586 NW2d 766 (1998), overruled in part by *People v Bell*, 473 Mich 275; 702 NW2d 128 (2005). Peremptory challenges do not entitle defendant to a jury of only those jurors he wishes. "'An impartial jury is all that a party is entitled to, and when he has obtained that he has no valid ground for complaint.'" *People v Badour*, 167 Mich App 186, 190; 421 NW2d 624 (1988) rev'd on other grounds sub nom *People v Beckley*, 434 Mich 691; 456 NW2d 319 (1990). Here, defendant fails to argue that the jury was not impartial. Therefore, the failure to exercise additional peremptory challenges did not violate his right to a fair and impartial jury. Nor has defendant shown that because of counsel's mistake, his trial was unreliable or fundamentally unfair. There was sufficient evidence to support his conviction of felonious assault; the verdict was not unreliable. Therefore, reversal is not required.

Defendant also argues that harmless error analysis is inappropriate in this case because the denial of peremptory challenges is a structural error and reversal of the conviction is automatic. *United States v McFerron*, 163 F3d 952, 955-956 (CA 6, 1998). However, our Supreme Court stated that because peremptory challenges are not constitutionally guaranteed, but only a product of state law, MCL 768.12, and court rule, MCR 6.412(E), constitutional analysis does not apply. *Bell, supra* at 295. Thus, the denial is not structural error, and reversal is unwarranted. Even if we were to challenge our Supreme Court's ruling in *Bell* as dicta, it would not change the outcome of this case, because the trial court did not deny defendant's exercise of the peremptory challenges; rather, counsel's mistake did.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Helene N. White
/s/ Stephen L. Borrello